(9)

Supreme Court, U.S.
FILED
APR 8 2002
CLERK

No. 01-309

In The

Supreme Court of the United States

LARRY HOPE,

Petitioner,

v.

MARK PELZER, GENE MCCLARAN, and JIM GATES a/k/a KEITH GATES,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF FOR PETITIONER

Counsel for Petitioner

CRAIG T. JONES*
3166 Mathieson Drive
Suite 100
Atlanta, GA 30305
(404) 842-0851
fax (404) 239-0520

JAMES MENDELSOHN
1117 22nd Street South
Birmingham, AL 35205
(205) 939-0000

J. RICHARD COHEN
RHONDA BROWNSTEIN
SOUTHERN POVERTY LAW CENTER
400 Washington Avenue
Montgomery, AL 36104
(334) 956-8200

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

25 pp

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ARGUMENT 1

I. THE RESPONDENTS' ARGUMENTS ARE PREMISED ON UNSUPPORTED FACTUAL CLAIMS THAT WERE NOT PROPERLY RAISED BELOW 1

II. THE COURT OF APPEALS' RULING ON THE UNDERLYING CONSTITUTIONAL RIGHTS ISSUE IS NOT BEFORE THE COURT, BUT IS CORRECT 6

III. THERE NEED NOT BE A PRIOR CASE WITH "MATERIALLY SIMILAR" FACTS TO OVERCOME THE DEFENSE OF QUALIFIED IMMUNITY 11

IV. THE UNCONSTITUTIONALITY OF USING RESTRAINTS AS PUNISHMENT WAS CLEARLY ESTABLISHED IN 1995 14

CONCLUSION 20

TABLE OF AUTHORITIES

Page

CASES

Anderson v. Creighton, 483 U.S 635 (1987) 11

Ashby v. Dees, No. CV-94-U-0605-NE (N.D. Ala. Dec. 27, 1994) 16

Austin v. Hopper, 15 F. Supp. 2d 1210 (M.D. Ala. 1998) 4, 5, 8, 11

Butz v. Economou, 438 U.S. 478 (1978) 13

Dale v. Murphy, No. CV-85-1091-H-S (S.D. Ala. Feb. 4, 1986) 16

El Paso Natural Gas Co. v. Neztsosie, 526 U.S. 473 (1999) 1

Elder v. Holloway, 510 U.S. 510 (1994) 14, 16, 17

Farmer v. Brennan, 511 U.S. 825 (1994) 9

Gates v. Collier, 501 F.2d 1291 (5th Cir. 1974) .... *passim*

Hansen v. Soldenwagner, 19 F.3d 573 (11th Cir. 1994) 17

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 4, 11, 13

Hickey v. Reeder, 12 F.3d 754 (8th Cir. 1993) 18

Hollis v. Folsom, No. CV-94-T-0052-N (M.D. Ala. Nov. 4, 1994) 16

Hope v. Pelzer, 122 S. Ct. 933 (2002) (No. 01-309) 6

Hudson v. McMillian, 503 U.S. 1 (1992) 1, 11

Hudson v. McMillian, 503 U.S. 4 (1991) 9, 10

TABLE OF AUTHORITIES – Continued

Page

Lane v. Findley, No. CV-93-C-1741-S (N.D. Ala. Aug. 4, 1994) 16

Malley v. Briggs, 475 U.S. 335 (1986) 15

Northwest Airlines, Inc. v. County of Kent, 510 U.S. 355 (1994) 1

Ort v. White, 813 F.2d 318 (11th Cir. 1987) ... 10, 17, 18, 19

Rhodes v. Chapman, 452 U.S. 337 (1981) 8

Saucier v. Katz, 533 U.S. 194 (2001) 1, 4, 6, 7

Sims v. Mashburn, 25 F.3d 980 (11th Cir. 1994) 19

Teague v. Lane, 489 U.S. 288 (1989) 13

United States v. Lanier, 520 U.S. 259 (1997) 12

Vinson v. Thompson, No. CV-94-A-268-N (M.D. Ala. Dec. 9, 1994) 16

Washington v. Harper, 494 U.S. 210 (1990) 10

Wells v. Franzen, 777 F.2d 1258 (7th Cir. 1985) 17

Whitley v. Albers, 475 U.S. 312 (1986) 8, 9, 10

Whitson v. Gillikin, No. CV-93-H-1517-NE (N.D. Ala. Jan. 24, 1994) 16

Williams v. Burton, 943 F.2d 1572 (11th Cir. 1991) 18, 19

Williams v. Taylor, 529 U.S. 362 (2000) 13

Williamson v. Anderson, No. CV-92-H-675-N (M.D. Ala. Aug. 18, 1993) 16

Wilson v. Layne, 526 U.S. 603 (1999) 15

TABLE OF AUTHORITIES – Continued

Page

Wilson v. Seiter, 501 U.S. 294 (1991) 9, 12

Yee v. City of Escondido, 503 U.S. 519 (1992) 7

STATUTES AND RULES

28 U.S.C. § 2254(d)(1)..... 13

Sup. Ct. R. 14.1(a)..... 6

ARGUMENT

I. THE RESPONDENTS' ARGUMENTS ARE PREMISED ON UNSUPPORTED FACTUAL CLAIMS THAT WERE NOT PROPERLY RAISED BELOW

All of the respondents' arguments in this case rest on factual assertions that have no basis in the record. When the respondents raised the same supposed "facts" for the first time on appeal, the Eleventh Circuit – guided by the requirement that the facts must be taken as true "in the light most favorable to the party asserting the injury," *Saucier v. Katz*, 533 U.S. 194, 201 (2001) – rejected them. This Court should do likewise. A party may not defend a judgment on the basis of an argument that was not properly raised below and that has no evidentiary foundation. *See Hudson v. McMillian*, 503 U.S. 1, 12 (1992) (refusing to consider respondents' argument because it was based on a factual assertion that was "inapposite on th[e] record" and because it was "not addressed" by the court below and was "not presented by the question on which [the Court] granted certiorari"); *cf. El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, 479 (1999) (affirming that party "may 'urge in support of a decree any matter appearing in the record' ") (citation omitted); *Northwest Airlines, Inc. v. County of Kent*, 510 U.S. 355, 364 (1994) (noting party may "defend a judgment on any ground properly raised below").

Respondents admit that the "whole point" of placing Hope on the hitching post was to induce pain – to make Hope "uncomfortable," to borrow respondents' term. Resp. Br. 27. But respondents claim that they were merely trying to persuade Hope to return to work and that Hope could have ended his ordeal at any time simply by complying. Hope, respondents claim, always "held the keys to his release in his own pocket." *Id.* at 43; *accord id.* at 2, 27-28. The district court, respondents argue, "did not find that any prison officer, much less one of the respondents,

had forced Hope to stay on the bar after he had expressed a willingness to go to work." *Id.* at 10. Although the respondents acknowledge for summary judgment purposes that they "either ordered Hope [to] be put on the bar or . . . cuffed him to the bar themselves," *id.*, they contend that they had "no reason to assume" that other officers would fail to release Hope "as soon as he agreed to return peaceably to work" pursuant to Regulation 429 of the Alabama Department of Corrections. *Id.* at 21. These supposed "facts" are necessary to respondents' claim that they did not violate petitioner's Eighth Amendment rights, *see, e.g.*, Resp. Br. 19-31, as well as to their contention that they are entitled to qualified immunity even if they did. *See, e.g., id.* at 31-44. They are equally central to the arguments of respondents' amici.

But these "facts" find no support in the record. In the proceedings before the district court, Hope alleged that the hitching post had been used against him "as a form of punishment." Supp. Pet. App. 21. The respondents never contended in their affidavits or in their briefs in response that they cuffed Hope to the post to induce him to go back to work or that he would have been released had he complied. They never contended that they told Hope or that he knew that he supposedly would be released if he agreed to go back to work. They never even contended that they had "assumed" that Hope would be released if he agreed to go back to work. Indeed, the respondents did not even introduce Regulation 429 into the district court record.[1]

---

[1] The respondents suggest that the magistrate judge somehow relied upon Regulation 429 despite the fact that it was not before him and despite the fact that the respondents never claimed that they had complied with the regulation. *See* Resp. Br. 10-11 (claiming that magistrate judge found "no clearly established constitutional precedent prohibiting prison officers from employing a measure like Regulation 429"). But there is no mention of the regulation or the respondents' supposed compliance with it in the magistrate judge's recommendation or in the district court's opinion. *See* Supp. Pet. App. 1-33.

The respondents raised their claim that Hope held the "keys" to his own release for the first time on appeal. *See* Pet. App. 9 (respondents "claim[ ] that Hope would have been released from the hitching post had he asked to return to work"); Resp. C.A. Br. 5 ("unique thing about the restraining bar was [that] an inmate who wanted to return to work would be removed from the restraining bar and returned to work"); *id.* at 17. Following oral argument, they lodged a copy of Regulation 429 with the court of appeals. *See* App. 108-112.

The court of appeals rejected the respondents' new factual claim. Instead of crediting respondents' assertions that they cuffed Hope to the post to induce him to work and that he held the keys to his own release, the court recognized that the record, viewed most favorably to Hope, compelled the opposite conclusion.

> While the DOC claims that Hope would have been released from the hitching post had he asked to return to work, the evidence suggests that is not the case. First, Hope never refused to work. . . . Second, Hope was placed in a car and driven back to Limestone to be cuffed to the hitching post on both occasions. Given the facts, it is improbable that had Hope said, "I want to go back to work," a prison guard would have left his post at Limestone to drive Hope back to the work site. It is more likely that the guards left Hope on the post until after his work detail returned to teach the other inmates a lesson.

Pet. App. 9-10; *see* App. 47 (Hope Aff.) ("I was *left* on the hitching post for approximately seven (7) hours")

(emphasis added).[2] Because the "written policy, Alabama Administrative Regulation 429, [was] not in the district court record," the court of appeals did "not address it." Pet. App. 4 n.5.

Respondents contend that the court of appeals had "no record basis" to reject their claim that Hope held the keys to his own release. Resp. Br. 13. They repeatedly argue that Hope never claimed that he was left on the post after he expressed a willingness to return to work. But respondents ignore the fact that this issue was part of their defense, not one for Hope to rebut in advance. *See Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1982) ("Qualified or 'good faith' immunity is an affirmative defense. . . . ") (citation omitted). And they ignore the fact that they never claimed in the district court that Hope would have been released had he agreed to return to work or even that they had "assumed" that he would have been. The district court never made particularized findings on these issues because the respondents never asked the court to do so. Saddling Hope with the absence of "findings" rebutting a defense that was never raised – the respondents' suggestion here, *see* Resp. Br. 11-13 – would be a far cry from viewing the facts "in the light most favorable to the party asserting the injury." *Saucier*, 533 U.S. at 201.

The court of appeals' refusal to credit the respondents' claim that Hope held the keys to his own release is consistent with the findings in *Austin v. Hopper*, 15

---

[2] Respondents argue that "it must be assumed" that Hope was allowed at least a bathroom break during his seven hours on the post in June 1995 because he was given such a break while on the post in May. Resp. Br. 13-14. But in the face of Hope's statement that he was "left" on the post for seven hours, App. 47, this inference would be an impermissible one in the absence of specific evidence to support it. The prison logs that respondents claim Hope should have introduced to prove his point, *see* Resp. Br. 13, were within the respondents' control.

F. Supp. 2d 1210 (M.D. Ala. 1998). There, the court found that inmates "were forced to stay on the hitching post until their squad had returned from the work site" even if they expressed a willingness to work, *id.* at 1245 – exactly the same conclusion that the Department of Justice reached in an investigation conducted the year before the events giving rise to this case. *See id.* at 1249 (citing DOJ findings that hitching post was used as a form of "corporal punishment" and that corrections officers "failed to comply with the policy of immediately releasing any inmate from the hitching post who agrees to return to work"). Although the respondents may not be bound by the *Austin* or Department of Justice findings, those findings are all the more reason why this Court should not credit the respondents' unsupported claim that they "assumed" when they put Hope on the post that he would be released pursuant to Regulation 429 if he agreed to return to work.

The respondents concede that the record supports the conclusion that they "either ordered Hope [to] be put on the bar or had cuffed him to the bar themselves." Resp. Br. 10. But they claim that their responsibility ended there. *See id.* at 10, 14; *accord* Mo. Amici Br. 18, 22-23. The suggestion, of course, is that Hope sued the wrong people. But this line of argument – with its hypothetical division of labor between guards who place inmates on the hitching post and guards who are supposedly responsible for releasing inmates once they agree to return to work – rests entirely on the respondents' contention that they handcuffed Hope to the post to induce him to return to work, rather than to punish him after he had fought with another inmate and five guards. Because this contention was not raised in the district court and because the record, viewed most favorable to Hope, compels the opposite conclusion, this Court should not consider it.

II. THE COURT OF APPEALS' RULING ON THE UNDERLYING CONSTITUTIONAL RIGHTS ISSUE IS NOT BEFORE THE COURT, BUT IS CORRECT

A. The first issue briefed by respondents – the question whether the court of appeals correctly ruled that "the policy and practice of cuffing an inmate to a hitching post or similar stationary object for a period of time that surpasses that necessary to quell a threat or restore order is a violation of the Eighth Amendment," Pet. App. 11 – is not before the Court. In *Saucier v. Katz*, the Court explained that qualified immunity cases raise two distinct questions. 533 U.S. at 201. The first question is whether the facts alleged make out a violation of a constitutional right; the second question is whether that right was "clearly established." *Id.* In this case as in *Saucier*, the Court limited its grant of certiorari to issues concerning the second question. *Compare Hope v. Pelzer*, 122 S. Ct. 933 (2002) (No. 01-309), *with Saucier*, 533 U.S. at 207. Accordingly, the Court should not consider the first issue that respondents address, the constitutional rights question. *See* Sup. Ct. R. 14.1(a).

Because the court of appeals ruled that Hope's constitutional rights had been violated, Hope limited his petition for certiorari to issues concerning the second *Saucier* question. *See* Pet. Cert. i. Respondents' opposition to the petition did not take issue with the formulation of the questions or suggest that the Court had to or should consider the constitutional rights issue if it granted the petition. After granting the petition, the Court entered an order further limiting the questions presented. 122 S. Ct. 933 (No. 01-309).

Respondents admit that the two questions framed by the Court relate solely to the second *Saucier* question, the "clearly established" inquiry. Resp. Br. 19. They argue that the Court should nevertheless address the constitutional

rights issue because *Saucier* "made clear that, in Section 1983 cases, the question of constitutionality must be addressed" first. *Id.* But the fact that the lower courts, in resolving qualified immunity cases, should address the constitutional rights issue before proceeding to the second part of the *Saucier* inquiry does not mean that this Court, after the lower courts have resolved the threshold constitutional issue, cannot exercise its discretionary jurisdiction by limiting its grant of certiorari to issues concerning the second *Saucier* question. Indeed, in *Saucier*, the Court did just that. *See* 533 U.S. at 207 ("Because we granted certiorari only to determine whether qualified immunity was appropriate, . . . and because of the limits imposed upon us by the questions on which we granted review, we will assume a constitutional violation. . . . ").

This case is not the "exceptional" one where the Court should reach out to decide a question beyond those presented. *Yee v. City of Escondido*, 503 U.S. 519, 535 (1992). Indeed, this case is a particularly inappropriate one for the Court to bend its certiorari procedure. Respondents' discussion of the constitutional rights issue is predicated upon their factual claims that "Hope held the keys to his release" (or at least that they "assumed" that he did), Resp. Br. 20, 27; *see id.* at 19-31 – claims that have no basis in the record. *See* § I, *supra*.[3] Respondents' argument also is predicated upon their claim that the use

---

[3] The respondents' efforts to rewrite the record are quite extensive. *Compare, e.g.*, Resp. Br. 25 (Hope "was able to stand fully erect and lean his shoulders against the bar to take some pressure off the muscles in his arms and chest"), *with* Supp. Pet. App. 14 (magistrate judge recommendation) ("plaintiff is only slightly taller than the hitching post itself so his arms grew tired from being handcuffed so high"), *and* App. 45 (Hope Aff.) ("whenever I tried moving [my arms] to improve my circulation, the handcuffs would cut into my wrists and cause great pain and discomfort").

of the hitching post "was a cost-effective, safe and relatively pain-free way to impel inmates to work." Resp. Br. 31; *see id.* at 28. But there is no evidence in the record to support these factual claims either, and they are contradicted not only by the evidence that is in the record about what happened to Hope but also by numerous findings in the *Austin* case. *See, e.g., Austin*, 15 F. Supp. 2d at 1243-50 (detailing hitching post safety procedures not followed); *id.* at 1243 (concluding that hitching post inflicted "substantial physical harm to inmates"); *id.* at 1256 (adopting magistrate judge's conclusion that hitching post inflicted " 'extreme pain' "); *id.* at 1252 (finding typical use of hitching post not justified by "security risk, disturbance, or other type of situation requiring an immediately necessarily coercive measure"). This Court should not accept the respondents' invitation to go beyond the questions presented and decide an issue based upon the hypothetical set of facts that they have presented.

B. Even if the Court decides to address the first *Saucier* issue – the question whether Hope has alleged a violation of a constitutional right – it should come to the same conclusion as the court below: "cuffing an inmate to a hitching post for a period of time extending past that required to address an immediate danger or threat is a violation of the Eighth Amendment." Pet. App. 9; *see Gates v. Collier*, 501 F.2d 1291, 1306 (5th Cir. 1974) (handcuffing inmates to fences and forcing them to stand in awkward positions for prolonged periods violates the Eighth Amendment).

"[T]he unnecessary and wanton infliction of pain . . . constitutes cruel and unusual punishment forbidden by the Eighth Amendment." *Whitley v. Albers*, 475 U.S. 312, 319 (1986). "Among 'unnecessary and wanton' inflictions of pain are those that are 'totally without penological justification.' " *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981) (citation omitted). Courts considering Eighth

Amendment claims must, therefore, ask two questions. First, did prison officials act with a sufficiently culpable state of mind? *Wilson v. Seiter*, 501 U.S. 294, 298 (1991). Second, was the deprivation suffered by the prisoner sufficiently serious? *Id.*

In cases where inmates allege that prison conditions cause unnecessary suffering, the appropriate subjective inquiry is whether officials acted with "deliberate indifference" to inmate health or safety. *Hudson v. McMillian*, 503 U.S. 4, 5 (1991). On the other hand, where inmates allege that excessive force has been used, the inquiry is " 'whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.' " *Whitley*, 475 U.S. at 320-21 (citation omitted). The court of appeals applied the "deliberate indifference" test, rather than the *Whitley* standard, because the respondents "no longer faced the type of exigent circumstances required to invoke the *Whitley* standard" when they placed Hope on the hitching post. Pet. App. 5 n.7. But under either, the result is the same.

As the court of appeals held, Hope satisfied the "deliberate indifference" standard by "showing that the [respondents] were aware that placing him on the hitching post created a substantial risk of harm." Pet. App. 6. Even assuming that the respondents cannot be charged with notice of the Department of Justice report warning prison officials of the dangers posed by the hitching post, *see* Resp. Br. 22, the risk of harm caused by leaving anyone cuffed to a post "with his arms at approximately head level, in the hot sun for seven hours with no shirt, metal cuffs, only one or two water breaks, and no bathroom breaks," was obvious. Pet. App. 6; *see Farmer v. Brennan*, 511 U.S. 825, 842 (1994) ("a fact finder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious"). The

respondents admit, moreover, that the "whole point" of the hitching post was to cause pain. Resp. Br. 27. Given that there was no penological justification for inflicting pain in this case – there is no evidence in the record, for example, that exigent circumstances required Hope to be restrained or that the post was used to induce him to return to work – the *Whitley* standard has been satisfied. *See Whitley*, 475 U.S. at 320; *see also Ort v. White*, 813 F.2d 318, 325 (11th Cir. 1987) ("Prison officials step over the line of constitutionally permissible conduct . . . if they summarily and maliciously inflict harm in retaliation for past conduct."); § V, *infra*.

Once the subjective component of an Eighth Amendment claim has been established, courts must determine "if the alleged wrongdoing was objectively 'harmful enough' to establish a constitutional violation." *Hudson*, 503 U.S. at 8 (citation omitted). In conditions-of-confinement cases, "because routine discomfort is part of the penalty that criminal offenders pay for their offenses against society, only those deprivations denying the 'minimal civilized measure of life's necessities' are sufficiently grave to form the basis of an Eighth Amendment violation." *Id.* at 9 (citation omitted). Where, on the other hand, excessive force is alleged, the plaintiff need not demonstrate a "significant injury." *Id.*

Hope has met the objective component of the Eighth Amendment under either standard. He was "denied basic human necessities, such as water" and bathroom breaks, he was forced to stand for seven hours under a hot sun in an awkward position, his freedom of movement was severely restricted, and he suffered sunburn, swollen and bruised wrists, and extreme thirst. Pet. App. 8-9; App. 10-11; *cf. Washington v. Harper*, 494 U.S. 210, 226-27 (1990) (emphasis added) ("[p]hysical restraints are effective only in the short term, and *can have serious physical side effects when used on a resisting inmate*"). He also alleged that he

suffered psychological pain that required medical attention. *See* App. 8; *cf. Hudson*, 503 U.S. at 16 (1992) (Blackmun, J., concurring) (noting that the "pain" prohibited by the Eighth Amendment includes psychological pain).

This Court should not underestimate the danger of sanctioning any form of corporal punishment. *See generally Austin*, 15 F. Supp. 2d at 1246-48, 1256-58 (detailing hitching post abuses). As the court in *Gates* recognized, the kinds of abuses at issue here "offend contemporary standards of decency, human dignity, and precepts of civilization which we profess to possess." 501 F.2d at 1306.

III. THERE NEED NOT BE A PRIOR CASE WITH "MATERIALLY SIMILAR" FACTS TO OVERCOME THE DEFENSE OF QUALIFIED IMMUNITY

The first question posed by the Court is whether a plaintiff must point to a case presenting "materially similar" facts to demonstrate that the law is "clearly established" in order to overcome the defense of qualified immunity. In their brief, the respondents concede that a plaintiff need not always do so. Resp. Br. 32 (not required in "extreme cases"). The fact that the "material similarity" standard is inappropriate in certain cases reflects, not that the standard is "flexible" as the respondents suggest, *id.* at 36, but rather that it poses a danger of upsetting the balance of "conflicting concerns" in qualified immunity cases. *Anderson v. Creighton*, 483 U.S 635, 638 (1987); *see also Harlow*, 457 U.S. at 813 ("The resolution of immunity questions inherently requires a balance. . . . "). To overcome a qualified immunity defense, a plaintiff must show that the government official in question had "fair warning" of what the law required, not that there had been an earlier case with "materially similar"

facts. *See United States v. Lanier*, 520 U.S. 259, 270-71 (1997).

Respondents and their amici attempt to avoid the consequences of the concession that "material similarity" is not always required by limiting the concession to cases involving statutory or constitutional text. "Unless a constitutional provision or statute on its face establishes the unlawfulness of the conduct at issue," respondents' amici contend, "public officials can be deprived of their qualified immunity only if the unlawfulness of that conduct is 'clearly established' by a controlling, materially similar case." Mo. Amici Br. 6 (upper casing and bolding removed). The respondents appear to make a similar claim. Resp. Br. 32 ("[e]xcept for extreme cases, in which the right violated is readily apparent without aid of judicial precedent," case with materially similar facts required); *id.* at 36 ("In most Section 1983 cases, however, the right claimed does not spring obviously from the constitutional or statutory text. . . . ").

But the Court's decision in *Lanier* undercuts this view. In *Lanier*, the Court made it clear that a constitutional rule "identified in the decisional law" – not simply the text of the Constitution itself – "may apply with obvious clarity" to a new case. 520 U.S. at 271. Just as some punishments may be so harsh that they obviously run afoul of the prohibition against "cruel and unusual" punishment contained in the text of the Eighth Amendment, for example, so too may some punishments be so harsh that they obviously run afoul of the prohibition against "the unnecessary and wanton infliction of pain" contained in the decisional law interpreting the Eighth Amendment. *See Wilson v. Seiter*, 501 U.S. at 297.

The suggestion by respondents' amici that the Court look to its habeas jurisprudence to answer the first question presented is grounded on a serious misreading of *Williams v. Taylor*, 529 U.S. 362 (2000). According to

respondents' amici, Justice Stevens' opinion in *Williams* "noted that the *Teague* rule [from the habeas context] was the 'conceptual twin' of the 'clearly established law' inquiry in the qualified immunity context." Mo. Amici Br. 12 (citing *Williams*, 529 U.S. at 380 n.12 (Stevens, J., concurring)). Actually, Justice Stevens' opinion *rejected* the analogy between the phrase "clearly established" law in the habeas context, 28 U.S.C. § 2254(d)(1), and the similar phrase in "the doctrinally distinct law of qualified immunity" – an "unrelated area of [the Court's] jurisprudence." 529 U.S. at 380 n.12. The "clearly established" law requirement in the habeas context is "the conceptual twin" not of the similar phrase in the qualified immunity context, but of the "new rule" habeas jurisprudence originating with *Teague v. Lane*, 489 U.S. 288 (1989). *See Williams*, 529 U.S. at 379-80 n.12 (Stevens, J., concurring).

Habeas jurisprudence and the law of qualified immunity are animated by different concerns. In the habeas context, where there has been a state court adjudication on the merits of a constitutional claim, the federal courts must be sensitive to "principles of comity, finality, and federalism." *Williams v. Taylor*, 529 U.S. 420, 436 (2000). In the qualified immunity context, the federal courts must balance the need to vindicate "constitutional guarantees" against the need to minimize the "social costs" of litigation against blameless public officials. *Harlow*, 457 U.S. at 813-14. In qualified immunity cases, there is no issue of deferring to final state court judgments, nor are state officials entitled to any heightened degree of immunity in the name of federalism or comity. *See id.* at 818 n.30 ("[I]t would be 'untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials.' " (quoting *Butz v. Economou*, 438 U.S. 478, 504 (1978))). As a practical matter, there is little to be gained by forcing an analogy between

habeas and qualified immunity cases merely because the cases happen to employ similar terms.[4] The fact that habeas law is statutorily based is another reason the Court should not tie its qualified immunity jurisprudence to it.

IV. THE UNCONSTITUTIONALITY OF USING RESTRAINTS AS PUNISHMENT WAS CLEARLY ESTABLISHED IN 1995

When Hope was handcuffed to the hitching post in an awkward position in the hot sun for seven hours in 1995, it was clearly established that such a form of punishment was unconstitutional. *See, e.g., Gates v. Collier*, 501 F.2d 1291 (5th Cir. 1974). The fact that a number of magistrate judges missed *Gates* in prior cases is irrelevant. *See Elder v. Holloway*, 510 U.S. 510, 515 (1994) (holding that qualified immunity rulings cannot turn on "shortages in counsel's or the court's legal research or briefing"). The respondents' argument that *Gates* does not apply here is predicated upon their familiar claim that Hope "held the keys to his own release" – a claim that has no basis in the record. In this case, there were no exigent circumstances or other valid penological reasons for using the hitching post. For this reason, all the cases relied upon by respondents actually support Hope's position.

---

[4] Respondents' amici argue that adopting the Eleventh Circuit's material similarity standard for qualified immunity cases "would allow courts to look to the habeas context for guidance in determining whether a particular right or principle is 'clearly established' in the case law." Mo. Amici Br. 16. But courts resolving qualified immunity questions are not now constrained from looking beyond qualified immunity cases to determine whether a right is "clearly established."

In *Gates*, the former Fifth Circuit found that "handcuffing inmates to the fence and to cells for long periods of time . . . and forcing inmates to stand, sit or lie on crates, stumps, or otherwise maintain awkward positions for prolonged periods" violated the Eighth Amendment. *Id.* at 1306. The respondents concede that the practices outlawed in *Gates* were "abusive" and constituted "corporal punishment." Resp. Br. 43. Predictably, they attempt to distinguish their own identical practices by claiming that they "put Hope on the bar pursuant to a written prison policy" that gave Hope "the keys to his release." *Id.* Because there is no underlying support for their factual contention, the distinction carries no weight.

Given the absence of any evidence that the respondents put Hope on the hitching post to induce him to go to work pursuant to their Regulation 429, *Wilson v. Layne*, 526 U.S. 603 (1999), is entirely beside the point. In *Wilson*, the Court affirmed a ruling of qualified immunity for United States marshals who had allowed reporters to accompany them during the execution of arrest warrants pursuant to a policy that explicitly permitted the challenged practice. *Id.* at 617. But unlike in *Wilson*, the only permissible inference in this case is that the respondents acted contrary to the supposed policy, not pursuant to it. Even if there had been a written policy that allowed correctional officers to use a hitching post to punish inmates, it could not insulate those who followed it from the force of *Gates*. *See Wilson*, 526 U.S. at 617 (a policy cannot " make reasonable a belief that was contrary to a decided body of case law"); *cf. Malley v. Briggs*, 475 U.S. 335, 346 n.9 (1986) (holding that a police officer who unreasonably applies to a magistrate for a search warrant "cannot excuse his own default by pointing to the greater incompetence of the magistrate [who approved the officer's request]").

In an effort to blunt *Gates'* clear application to their conduct, the respondents cite seven unpublished magistrate judge recommendations they claim authorized their actions. *See* Resp. Br. 42, 44. Six were dismissals of *pro se* challenges to various practices involving the handcuffing of inmates to stationary objects.[5] In the one case in which an attorney appeared on behalf of the inmate, the magistrate judge relied heavily on the fact that the defendant officer "gave [the inmate] the choice of either working or being handcuffed to the security bar," a fact that is conspicuously absent here. *Whitson v. Gillikin*, No. CV-93-H-1517-NE, slip op. at 10 (N.D. Ala. Jan. 24, 1994). None of the magistrate judge recommendations considered or even cited *Gates*, a case directly on point. As the Court recognized in *Elder v. Holloway*, qualified immunity dispositions must be conducted in light of *all* relevant precedents, not simply those cited, or discovered by the district court. 510 U.S. at 515-16. The fact that the various magistrate judges missed a controlling case does not

[5] Two of the cases involved use of a hitching post. *Vinson v. Thompson*, No. CV-94-A-268-N, slip op. at 2, 5 (M.D. Ala. Dec. 9, 1994) (dismissing challenge of 45-minute restraint on hitching post for failure to present any evidence in support of allegations); *Lane v. Findley*, No. CV-93-C-1741-S, slip op. at 9 (N.D. Ala. Aug. 4, 1994) ("It is important to note that [the inmate] was given food, water, and the opportunity to use toilet facilities. . . . "). Three of the cases involved handcuffing inmates to fences. *Hollis v. Folsom*, No. CV-94-T-0052-N, slip op. at 9 (M.D. Ala. Nov. 4, 1994) (handcuffed to fence for 15 minutes); *Ashby v. Dees*, No. CV-94-U-0605-NE (N.D. Ala. Dec. 27, 1994) (handcuffed to fence for 45 minutes); *Williamson v. Anderson*, No. CV-92-H-675-N, slip op. at 3 (M.D. Ala. Aug. 18, 1993) (summarily dismissing Eighth Amendment claim). One case involved handcuffing an inmate around a light pole. *Dale v. Murphy*, No. CV-85-1091-H-S, slip op. at 2 (S.D. Ala. Feb. 4, 1986) (handcuffed to pole in squash field for 35 minutes).

mean that *Gates* should be read out of the Federal Reporter. As the Court noted in *Elder*, qualified immunity rulings cannot turn on "shortages in counsel's or the court's legal research or briefing." *Id.* at 515.

The respondents also rely on a series of cases permitting restraints and other coercive practices to be used as temporary measures in emergency situations. *See* Resp. Br. 40-41. These cases actually support Hope's position, not the respondents', given that there is nothing in the record showing that an emergency existed that would have justified the restraints imposed on Hope.[6] In *Ort v. White*, 813 F.2d 318 (11th Cir. 1987), the case most heavily relied upon by the respondents and their amici, the Eleventh Circuit upheld the denial of water to an inmate who was creating a disturbance at a workplace outside of the prison. The court emphasized that the officer "faced a disruptive and potentially dangerous situation, compounded by the fact that he was out in the field away from the additional manpower and security of the prison facility." *Id.* at 325. The court explained that it may have

[6] *Wells v. Franzen*, 777 F.2d 1258 (7th Cir. 1985), a Seventh Circuit decision that involved the restraint of a suicidal inmate to his bed for nine days, would also support Hope's position, not the respondents', if it were applicable in the Eleventh Circuit. *Cf. Hansen v. Soldenwagner*, 19 F.3d 573, 578 n.6 (11th Cir. 1994) ("[T]he case law of one other circuit cannot settle the law in [the Eleventh] circuit to the point of being 'clearly established.' "). The court of appeals did not hold, as the respondents claim, that "shackling a prisoner by his four limbs to a bed for nine days straight, without bathroom breaks or regular access to water, did not violate the Eighth Amendment." Resp. Br. 40. To the contrary, the Seventh Circuit reversed the district court's grant of summary judgment for the defendants, holding that "[i]n light of the eighth amendment precedents, plaintiff's allegations concerning the conditions of his restraint are sufficient to warrant further examination." *Wells*, 777 F.2d at 1264.

reached a different result if the denial of water to the inmate – like the use of the hitching post here – had been used as punishment upon return to the prison. *Id.* at 326 ("We acknowledge that we might have reached a different decision if later, ***once back at the prison***, officials had decided to deny appellant water as punishment for his refusal to work.") (emphasis added).

The respondents here never alleged that exigent circumstances justified their acts, nor did they ever allege in the district court that they put Hope on the post to induce him to return to work. Under the standard clearly established by *Ort*, the record here shows that Hope was subjected to the hitching post as *punishment* "administered to chastise the wrongdoer and to deter him and others from engaging in such unacceptable conduct in the future. Punishment in this sense is not designed to bring an ongoing violation to a halt." *Id.* at 322. The court of appeals recognized this point. *See* Pet. App. 9-10.[7]

Williams v. Burton, 943 F.2d 1572 (11th Cir. 1991), another case relied upon by the respondents and their amici, also establishes that the unnecessary use of

---

[7] Even if the hitching post had been employed to induce Hope to return to work, its use would still be subject to constitutional scrutiny. Applying a cattle prod to an inmate's body would surely be effective at coercing a recalcitrant inmate to return to work. The relevant question under the Eighth Amendment, of course, is whether the use of a cattle prod would inflict unnecessary pain, not whether it would be effective at coercing an inmate to return to work (which it surely would). If, as the respondents imply, the Eighth Amendment permitted all coercive measures, no matter how painful, the use of a cattle prod to induce an inmate to return to work would not violate the constitution. *Cf. Hickey v. Reeder*, 12 F.3d 754, 758-59 (8th Cir. 1993) (holding prison officials' use of stun gun to compel inmate's compliance with an order to clean his cell constituted the infliction of unnecessary pain in violation of the Eighth Amendment).

restraints violates the Eighth Amendment. *Williams* upheld the use of four-point restraints for twenty-eight hours against an inmate who had "cursed and threatened to kill" two officers and had spat and threw bodily fluids on them. *Id.* at 1574. Unlike here, prison officials "were faced with a volatile situation" because Williams "was trying to incite other inmates to join him in a prison disturbance. . . . " *Id.* at 1575. The *Williams* court specifically distinguished cases like Hope's in which restraints are used as punishment, rather than as emergency measures:

> [Even if] restraints are initially justified, it becomes somewhat problematic as to how long they are necessary to meet the particular exigent circumstances which precipitated their use. The basic legal principle is that ***once the necessity for the application of force ceases, any continued use of harmful force can be a violation of the Eighth and Fourteenth Amendments, and any abuse directed at the prisoner after he terminates his resistance to authority is an Eighth Amendment violation.***

943 F.2d at 1575-76 (emphasis added); *accord Sims v. Mashburn*, 25 F.3d 980 (11th Cir. 1994) (holding officers were justified by exigent circumstances in stripping inmate's segregation cell and disconnecting his water).

Unlike the circumstances in *Ort* and *Williams*, there is no record basis upon which to conclude here that the respondents faced exigent circumstances that required them to use restraints. Although Hope fought with several officers on the work bus, he was not hitched to the post until after he was returned to the prison, more than an hour later. As the court of appeals pointed out, "[b]ecause the officers drove Hope back to Limestone before placing him on the hitching post, they no longer faced . . . exigent circumstances." Pet. App. 5 n.7; *cf. Ort*,

813 F.2d at 326 ("We acknowledge that we might have reached a different decision if later, ***once back at the prison***, officials had decided to deny appellant water as punishment for his refusal to work.") (emphasis added). The respondents do not dispute the point.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

CRAIG T. JONES*
3166 Mathieson Drive
Suite 100
Atlanta, GA 30305
(404) 842-0851

JAMES MENDELSOHN
1117 22nd Street South
Birmingham, AL 35205
(205) 939-0000

J. RICHARD COHEN
RHONDA BROWNSTEIN
SOUTHERN POVERTY LAW CENTER
400 Washington Avenue
Montgomery, AL 36104
(334) 956-8200

Counsel for Petitioner

**Counsel of Record*